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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 39

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr., of the Estate of Burse Phillips, Deceased, *Petitioners*,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE as Trustees of the United Mine Workers of America Welfare and Retirement Fund, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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IN THE

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OCTOBER TERM, 1963

No. 867

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admr., of the Estate of Burse Phillips, Deceased, *Petitioners*,

v.

JOHN L. LEWIS, HENRY G. SCHMIDT and JOSEPHINE ROCHE as Trustees of the United Mine Workers of America Welfare and Retirement Fund,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The district court[1] rendered a Bench Opinion which appears in the printed certified appendix[2] at pp. 85-

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[1] United States District Court for the Eastern District of Tennessee, Northern District.

[2] The printed certified appendix was filed by Petitioners herein (called "Phillips") as part of the Record to be found in the Clerk's office of this Court. Pagination references are to the printed certified appendix. The petition is abbreviated herein as "P." The abbreviation "A." refers to the appendix to this Opposition Brief. *Unless otherwise indicated, all emphases are supplied.*

99a. The portion thereof which pertains to the Respondent Trustees' instant case (No. 14,810 in the Sixth Circuit)[3] appears at pp. 95-99a and is printed herein as Appendix A. Likewise, the district court's judgment as to Respondent Trustees' case, found at pp. 82-84a of the printed certified appendix, is printed herein as Appendix B.

The Sixth Circuit's opinion is reported at 325 F. 2d 804 (Adv. Op. February 1, 1964) and in the certiorari petition at p. 75 *et seq.* The portion thereof which deals expressly with Respondent Trustees' case (No. 14,810) is found at 325 F. 2d 817-19 and in the certiorari petition at pp. 100-104.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

Pertinent statutory provisions appear in the Appendix to the certiorari petition at pages 104-112.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Sixth Circuit err in its concurrence with the district court that the evidence was not sufficient to sustain a jury verdict that the Trustees engaged in a conspiracy to unreasonably restrain interstate commerce in violation of the Sherman Act?

2. Does a finding of conspiracy by a labor union and certain operators signatory to a collective bargaining agreement, in violation of the Sherman Anti-Trust Act, preclude as a matter of law the right of Trustees of

[3] The United States Court of Appeals for the Sixth Circuit.

a trust created in the bargaining agreement to recover royalties therein provided for from an operator signatory to the Agreement?

3. Is the right of Trustees herein to recover unpaid royalties admittedly due by an operator signatory to the collective bargaining agreement to be defeated as a matter of law solely by a defense that the operators' employees were coerced into joining a labor union, when there has been no employee complaint thereof and after the employees have produced coal entitling Trustees to recover such royalties on their behalf?

4. Even assuming the evidence warranted a finding UMW had not performed the statutory requirements necessary to be performed before a valid union shop clause could be inserted in the contract between UMW and Phillips, does the fact that the agreement between Phillips and UMW contains the union security clause render the contract invalid and defeat the claim of Trustees herein?

COUNTERSTATEMENT OF THE CASE

A. TRUSTEES SUE TO RECOVER UNPAID ROYALTIES; AND THE SIXTH CIRCUIT AFFIRMED THE JUDGMENT IN TRUSTEES' FAVOR.

The National Bituminous Coal Wage Agreement of 1950 created the "United Mine Workers of America Welfare and Retirement Fund of 1950", called "Fund" (1114a), by the terms of which "each operator signatory" covenanted to pay into the Fund a specific sum of money for each ton of coal produced for use or for sale. All moneys paid into and/or due and owing Fund were vested exclusively in its Trustees (1116a). The 1950 Agreement, as subsequently amended in 1952, in 1955 and in 1956, set the per-ton payments at forty cents (1189-90a).

Phillips, admittedly signatory to the 1952, 1955 and 1956 Agreements (117a), failed to perform its covenants to pay and Fund Trustees instituted a district court action to recover a money judgment against Phillips for royalties on coal admittedly produced by it for use or sale under the Agreements (13a, 117a).

In a jury trial, wherein the district court instructed the jury that Phillips' sole defense is "the collective bargaining agreement was an instrument used in an alleged conspiracy allegedly participated in by the Trustees, the Union, and certain coal companies allegedly violative of" the Sherman Anti-Trust Laws (1572a, 1537-38a),[4] the jury found Trustees had so conspired (1588a). Upon Trustees' post-verdict motion for judgment n.o.v. or new trial (73-82a), the district court set the jury verdict aside, held "as a matter of contract" Trustees were entitled to recover unpaid royalties due them, excluding those "that accrued before a majority of Phillips' employees became UMW members on April 25, 1955" (98-99a) on the basis of principles announced in *International Ladies Garment Workers' Union, AFL-CIO* v. *NLRB*, 366 U.S. 731. It entered judgment in Trustees' favor against Phillips for $43,424.22 (83a; A. 5a).

Upon Phillips' appeal, the Sixth Circuit (325 F. 2d 819) affirmed the judgment, held the jury verdict "was not a bar" to Trustees' right to collect royalty payments under the contract on coal already mined, rejected Phillips' contention the bargaining agreement's union security clause precluded Trustees' recovery,

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[4] Phillips' several answers are found at 11a, 21a, 26a and 30a. By pre-trial order, the parties stipulated their respective theories (48a) which also appear in the district court's jury charge (1537a et seq.). Relevant provisions of the Sherman Act (15 USCA) are printed in the petition's appendix, pp. 104-105.

and swept aside Phillips' contention the manner in which Phillips executed the labor agreement and its employees became UMW members also precluded Trustees' right to recover royalty on coal already mined (325 F. 2d 818-19).

B. THE DISTRICT COURT REJECTED THE JURY'S VERDICT THAT TRUSTEES ENGAGED IN A CONSPIRACY.

Summarized, the overt acts which Phillips contended Trustees committed in furtherance of the alleged conspiracy, which Trustees denied, were included in the jury charge with Phillips' acquiescence (1539-40a, 1573a) and are: (1) The Fund was in fact under UMW's domination and control; (2) Trustees held out to the men in the industry the Fund was under union control; (3) Trustees paid benefits only to UMW members; (4) Trustees required (or stood by) as Fund beneficiaries picketed for UMW in order to obtain or retain Fund benefits; and (5) As a punitive measure, Trustees instituted legal actions against coal operators to recover royalties on coal produced.

In submitting to the jury for answer Form No. 1, reading (1577-8a):

> "Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or commerce among the several states as alleged by the original defendant, Phillips Brothers Coal Company?",

the district court told the jury (1572a) the Fund was created pursuant to Taft-Hartley's Section 302,[5] and provided for benefit payments to signatories' em-

[5] Labor Management Relations Act is called herein "Taft-Hartley". Its Section 302 [29 USCA 186] appears in the Appendix to the certiorari petition (P. 110-112) in part.

ployees, including Phillips'. The jury charge recognized —with Phillips' agreement—that Fund's Trustees had no legal right to require or not to require Fund beneficiaries to picket on behalf of UMW in labor matters (1572-3a); Trustees were legally obligated to collect all moneys due the Fund and to use all reasonable means to effect collection, including lawsuits (1573a); *that standing alone*, even the alleged acts that Trustees paid benefits only to UMW members, that Trustees, as a punitive measure, instituted actions to recover royalties, that Trustees required beneficiaries to picket to obtain or retain pension benefits "would not show" Trustees were co-conspirators (1573a) and that the "acts of individuals, unless you find from the evidence that the Trustees *actually participated in, or actually authorized such unlawful act, if any, or ratified such act, if any, after actual knowledge thereof*", would not bind Trustees "to make them parties to an alleged conspiracy" (1573a).[6]

The District Court's Reasons for Setting Aside the Jury Verdict

In setting aside the jury verdict, the district court held *"there is no material or substantial evidence in this record to support the"* jury finding that Trustees conspired as Phillips charged (83a, A. 6a).

The trial court found "no evidence that either" Trustees Boche, Schmidt or Owen (deceased) "had any dealings with large coal operators" from which to infer "they agreed, combined, or conspired to stabilize coal prices" (96-7a, A. 3a). These persons, the trial court noted, were the only ones, except for John L. Lewis, to serve the Fund after 1950. Citing *Van Horn*

[6] Following the jury charge, Phillips announced *"no exceptions to the charge and no requests for additional charges"* (1585a).

v. *Lewis*, DC,D.C., 1948, 79 F. Supp. 541, the trial court noted, "Action of a majority of the Trustees is required to bind the Fund" and that Lewis' action "alone without authorization or consent of a majority of the Trustees would not be sufficient . . . to bind the Fund or to show the Trustees conspired with large coal operators to drive a small operator out of business" (96-7a). Had Lewis controlled the other Trustees' actions when "this alleged conspiracy was formed", then "this might present a different question" but "there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund" (97a, A. 3-4a).

The district court rejected each of the overt acts (A. 3a-5a) Phillips contended proved Trustees guilty of conspiring (97a-98a). "It is true that there are some suspicious circumstances", declared the trial court, but "Substantial evidence means more than merely the suspicion of the existence of a fact" and "a juror's verdict cannot be based upon suspicion alone" (98a, A. 5a).

C. THE SIXTH CIRCUIT CONCURRED IN THE DISTRICT COURT'S FINDINGS AND CONCLUSIONS THAT TRUSTEES WERE NOT GUILTY OF THE CONSPIRACY CHARGED.

Upon Phillips' appeal (101a), the Sixth Circuit opined "the District Judge was not in error in setting aside the verdict and entering judgment for the Trustees notwithstanding the verdict" (325 F. 2d 818). It found "no direct evidence" Trustees "participated in the alleged conspiracy, and the inferences which Phillips would have us draw are not justifiable or reasonable in the light of the strong and uncontradicted

testimony of the Trustees themselves" (325 F. 2d 818). It concurred in the district court's analysis of the evidence (325 F. 2d 818).

D. FACTS SHOWING THAT BOTH LOWER COURTS CORRECTLY CONCLUDED TRUSTEES DID NOT ENGAGE IN THE ALLEGED CONSPIRACY.

1. The Sixth Circuit Correctly Approved the District Court's Conclusion That the Evidence Was Insufficient to Show UMW Dominated or Controlled the 1950 Fund

Notably, the Sixth Circuit premised its sanction of the district court's action in setting aside the jury verdict because of the "strong and uncontradicted testimony of the Trustees themselves" (325 F. 2d 818). The propriety of the Sixth Circuit's holding is manifest from the following undisputed facts:

Trustees Deny UMW's Control of the Fund

Uncontradicted is Lewis' statement that UMW always conceded to operators the right to select their own nominee for the operators' trustee position (291a) and that he refuted Love's "stooge" statement, described as "a propaganda statement" made in a "highly emotional state" vowing Love "like many operators, was carried away by his own fervor, to make untrue and incorrect statements" (292a).

Every trustee was told that, once seated, he was no longer agent of the parties nominating him and his sole fealty thereafter was to operate the trust for the purposes and in the manner specified by law (293a).

Lewis avowed his "meticulous adherence" to the "good faith administration of that policy". To Trustee Roche, the Trustees' "obligation is completely to the sound administration of the trust . . . to operate it in conformity with the trust agreement," and "the National Labor Relations Act" and "to administer the trust soundly in the long-range interest to all benefici-

aries who are eligible for benefits" (1044a). Similarly, Trustee Schmidt expressed his role "solely in the capacity of an individual responsible only to my conscience" and to the Fund's principles and objectives (1060a). Asked if Lewis sought to control the handling of the trust, Roche answered, "No, sir, never" (1043a). Both Roche (1044a) and Schmidt (1060a) deny Lewis dominated the Fund. Matters coming before the Trustees were discussed "in formal session" at length. On a percentage basis, "Roche takes up most of the time, and [Schmidt] comes next, and Mr. Lewis is a very poor third. He listens most of the time" (1061a). These recitals stand undisputed.

Though Phillips complains (P. 30) that nomination of trustees was not properly a bargainable issue, Taft-Hartley's Section 302(c) [29 USCA 186(c)] mandates "employees and employers" must be "equally represented" and the 1950 Agreement records Lewis as the employees' choice, and Charles A. Owen as the operators' choice. *There is no evidence Owen was not the operators' free choice.* While the statute provides the neutral trustee be chosen by the employer and employee representatives [29 USCA 186(c) (B)], Phillips' complaint (P. 30) that Roche, as the neutral trustee, was named in the 1950 Agreement ignores Roche's *undisputed* avowal she was *"named by the other trustees in the contract"* (1017a).

The district court, with the Sixth Circuit's approval, declared "Trustees testified *positively* that the Union did not dominate or control the Fund" and "The evidence is insufficient to show the contrary" (A. 4-5a). No evidence offered by Phillips challenges this affirmative, positive proof.

A U. S. Senate Subcommittee Approved the Fund's Activities.

Propriety and legality of Trustees' actions are reflected in a report of a subcommittee of the United States Senate on April 6, 1956, stating the Fund "is honestly and well administered", "providing benefits efficiently and at low administrative cost"; "the pension plan is carefully administered, with pensions given to those who meet the eligibility requirements established by the Trustees, and withheld from those who do not"; and concluding that the "total picture" of the Fund discloses "a far-flung, pioneering, and well run program" (352-4a).

Recent Trustees' Resolutions Do Not Evidence a Conspiracy.

Phillips argues (P. 49) that proof that Trustees engaged in the conspiracy is a recent resolution, passed by Trustees, rendering ineligible for benefits unemployed miners who join to open small mines because of lack of other employment. Phillips ignores the relevant fact that as such miners form small companies and become "connected" with a mine's management they lose their identity *as employees* of signatory operators and are denied benefits even though they remain UMW members, thus showing that *employee status* and *not union membership* is the basis for a benefits award—an element fully discussed *post*, p. 16 et seq.

The Sixth Circuit Tacitly Rejected Phillips' Baseless Attack on the Trustees.

Though Phillips' position that UMW dominated and controlled the Fund to force small coal operators out of business is totally without any evidentiary basis, Phillips employed it in the lower courts and now in this Court to conduct a scurrilous and unwarranted attack on the personal integrity and character of Trustees

Lewis, Schmidt and Roche. The trustee appointed by management and the trustee chosen to represent the public interest have been characterized as "stooges" of Trustee Lewis on the fallacious premise that Lewis would not permit the other Trustees to exercise independent judgment or to maintain personal integrity. What does the record have to say about these persons both as individuals and as Trustees?

For the better part of the past fifty years, Trustee Roche has been a dedicated servant of the people of this country: A noted social worker (1006-11a); an aide to Herbert Hoover in Belgium Relief (1008a); an active participant in enacting child labor laws (1009-10a); an appointee of President Wilson to an important committee composed of cabinet rank officials (1009a); the Assistant Secretary of the Treasury under President Roosevelt (1013a), assisting in the development of the Public Health Service and the Social Security Act; the Director of the 1947 Fund (1015a), developing policies and procedures to effectuate a totally new concept in labor relations; and finally Trustee as well as Director of the 1950 Fund named by the other trustees in the contract (1017a).

Trustee Schmidt, equally distinguished, progressed from a "molder's helper" shoveling sand (1049a) to "manager of the engineering staff" of Goodyear Tire & Rubber Company (1051a), and for the last eighteen years, he has been North American Coal Corporation's chief executive officer (1052a). He became a Fund Trustee in May, 1958 (1053a) without opposition or complaint from *any* coal operator (1055a), either at the time of, or since, his appointment (1055a). Schmidt, as a trustee, regarded the payment to his Trustee predecessor of $35,000 as "wrong" (1053a,

1062a) and he feels he owes it "to the industry, . . . to the coal miners, to society, to give some of my time to this great effort" which "provides welfare services, health and medical services to coal miners . . . and to provide pensions, and . . . to help the survivors of mine disasters" (1062a).

Thus, the record condemns the accusation that Trustees Schmidt and Roche could be bought or forced to participate in a conspiracy to violate the laws of the United States, or that Trustee Lewis would attempt to require illegal acts.

To prove Roche was one of the "stooges" Love mentioned, Phillips point out (P. 31) that Roche stated prior to her appointment as Trustee she had no previous connection with UMW and then, as if there were a discrepancy, notes that UMW admitted its purchase of 222,720 shares of stock in Rocky Mountain Fuel Company of which Roche was president and chief owner. The evidence does not show the stock was purchased from her, and it does not reveal Roche gained personally from UMW's purchase and owership of Rocky Mountain Fuel stock. Again, the stock was acquired "subsequent to the closing down of that company and while it was in liquidation" and it was "a non-operating, non-producing coal company" (349a, 1243a). Though Phillips now seeks to imply improper UMW influence from such stock purchase, significantly Phillips did not cross-examine Roche concerning this matter.

When Trustee Roche became associated with the Fund, "she was no longer an active operator representing the industry and the company was not operating" (349a). Phillips' unfounded charge is made in the face of uncontradicted evidence that Trustee Roche

"was recognized as the best qualified person that was available for the public trusteeship" (349a), which is affirmed by the entire record in this case.

Although Trustee Schmidt became a Trustee only eight months before the end of the period of the alleged conspiracy, he did not escape Phillips' baseless innuendo he too conspired to violate a federal statute. While Phillips, in the trial court, presented the impression that Trustee Schmidt was a person whose "eyes" have been "willfully closed to the conditions, to the Trustees' affairs" (T. 3368)[7] with respect to pensioners being required to picket, punitive lawsuits and payments of Fund benefits only to UMW members, the record totally destroys any basis for this fanciful suspicion and conjecture. Trustee Schmidt stands uncontradicted that the Fund's policies have "been carried out to the best of my knowledge, and right out all through the administration of the Fund" (1059-60a).

As already noted, the Sixth Circuit sanctioned the district court's action in setting aside the jury verdict because of the *"strong and uncontradicted testimony of the Trustees themselves", thus tacitly rejecting and stamping as baseless Phillips' attack upon the Trustees.*

Phillips' Contention That UMW Sought to Control the Fund Before 1950 is Both Irrelevant and Unsupported by the Evidence.

Phillips fails to disclose that two welfare funds anteceded the 1950 Fund which is involved herein: (1) an initial welfare and retirement fund in a May 29, 1946 labor agreement between UMW and the federal government resulting from UMW's dispute with coal operators and following government seizure of coal

[7] The abbreviation "T." refers to the transcript of the proceedings in the trial court.

mines, and (2) the 1947 Trust Fund created in the 1947 Agreement, the trustees of which were John L. Lewis, Ezra Van Horn and Thomas Murray.

To prove the evidence supported the jury verdict that UMW controlled the 1950 Fund, Phillips relies (P. 25) upon matters allegedly occurring *in 1948*, despite Phillips' allegations the conspiracy did not occur until 1950 (31a) and the 1950 Fund had no existence prior to March 5, 1950. Since there are three Trustees appointed to administer the 1950 Fund, each with the same authority (*Van Horn* v. *Lewis*, DC, D.C., 1948, 79 F. Supp. 541), Phillips fails to explain how matters ante-dating the 1950 Fund's existence and the Trustees' appointments as such could be imputed to them when their trustee status was neither *de facto* nor *de jure*.

In the 1948 Van Horn-Lewis Dispute, the Federal Court Vindicated Lewis.

The "long and bitter" fight Phillips charges (P. 26) Lewis had with Trustee Van Horn also occurred *in 1948;* and while Phillips claims this struggle related "to how the Fund should be managed" (P. 26), the litigation story told in *Van Horn* v. *Lewis*, DC, D.C., 1948, 79 F. Supp. 541, judicially refutes Phillips' position and records that Lewis' dispute with Van Horn concerned a resolution *to activate the pension fund*, which Van Horn opposed, but which the federal district court approved, together with an order mandating that a majority of Trustees (Lewis and Bridges) had the right to act in the trust's activation and administration.

The Lewis-Dawson Incident.

As Phillips concealed the litigation story in *Van Horn,* so too it fails to disclose relevant matters in the Lewis-Dawson incident which does not, in any event, prove Phillips' contention that UMW sought to name and control the Fund's Trustees (P. 26-29).

The 1948 Agreement expired June 30, 1949, and a successor contract was not executed until March 5, 1950. In the interim there existed no collective bargaining agreement although miners worked intermittently.

Van Horn resigned as Trustee because of dissatisfaction within the coal operators' group responsible for his appointment as Trustee; it had no relation to UMW (295a).

In two appearances at Trustees' meetings in the fall of 1949, Judge Charles I. Dawson claimed his appointment as a Fund Trustee (521a, 523a). Lewis admits Dawson's presence "not as a Trustee" but under a privilege to state to incumbent Trustees his right to be qualified, a claim not accepted by Trustees Lewis and Bridges (297a).

Though operators notified Lewis of Dawson's majority vote (296a), Trustees had not accepted Van Horn's resignation (299-300a) and Dawson's certification was not a "compulsive document" because the "manner of conducting the election" was open to criticism (300a).

The Dawson incident was eliminated by the 1950 Agreement's execution on March 5, 1950 which, *creating the 1950 Fund,* named Charles A. Owen of New York City as Operators' nominee, Lewis as that of

UMW and Josephine Roche as the Fund's neutral Trustee.[8]

Phillips stresses (P. 29-30) that during the 1949-50 negotiations antedating the 1950 contract, George Love, a principal Operator negotiator, stated UMW attempted to name "stooges" to serve as the Fund's Operator and neutral Trustees and that the identity of such Trustees was an issue. No evidence is even suggestive the "stooge" remark had reference to Trustee Owen (now deceased) or to Trustee-Director Roche. Moreover, the UMW-Operator struggle in 1949-50 was the subject of multiple litigation in the federal courts (1474-86a). *In none of variable suits instituted by Operators* and processed by variant governmental agencies, *was there ever complaint UMW sought to control the naming of the Trustees.*

2. The Sixth Circuit Correctly Concurred in the District Court's Conclusion That Union Membership Was Not a Prerequisite for Obtaining Fund Benefits After 1950

The Sixth Circuit agreed with the district court's conclusion (A. 4a), "The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund after 1950."

In urging the lack of supportive evidence (P. 32 et seq.), Phillips ignores crucial facts: (1) a federal district court enjoined UMW in 1950 from insisting on a fund "to be administered so as to provide benefits therefrom for 'UMW members only' " on the ground that a UMW-members-only fund would be incompatible with Taft-Hartley's Section 302(c); (2) there was judicial recognition of UMW's obedience thereto, and (3) *Phillips* acquiesced to the trial court's jury

[8] Dawson's suit to compel recognition as a Trustee (525a) was dismissed (526-27a).

charges that *the trust* agreement accorded with requirements of Taft-Hartley and "The trust agreement provides for the payments of benefits *to employees of signatory operators,* of which Phillips Brothers was one" (1475-86a, 1572a).

Further, *UMW membership is not, and has not been, a prerequisite for obtaining benefits from the Fund of 1950.* Trustees Lewis, Schmidt and Roche, and Trustees' counsel Mitch so avow (1026a, 1059a, 1119a, 1074a, 1076a, 1078a). Notably missing from eligibility requirements published by Trustees in each annual Fund report beginning June 30, 1951 through 1958 (Exhibits 128-137, 1026-27a)[9] is a requirement that applicants be UMW members. *The prime requisite therefor is that applicants be employees of a signatory operator;* and "Union membership has nothing to do with it" (1074a). UMW members working in non-union mines could not qualify for Fund benefits (1085a). Even UMW members failing to meet requirements have been rejected (1079a), whereas signatory operators' employees who are not UMW members have received Fund benefits (1076-77a).

Phillips' reference (P. 34) to a statement by Trustees' counsel Mitch in a court proceeding, taken

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[9] A summation of eligibility requirements (1074-76a) discloses they contain no demand that an applicant be a UMW member. Similarly, the 1954 Annual Report stated: "Trust Fund regulations governing authorization of pensions are the same as outlined in last year's Annual Report. These regulations require an applicant to be sixty years of age or over at time of application for pension, to have completed twenty years of service in a classified job in the coal industry within the thirty years immediately preceding the filing of an application, to have been regularly employed in a classified job in the coal industry immediately prior to May 28, 1946, and to have retired from a classified job in the coal industry after that date." (1028a).

out of context, was made in a case in which the issue was whether a man, *not an employee of a signatory operator,* could receive benefits under Taft-Hartley's Section 186(c). Mitch made plain the statement "means only members of 'UMW' who happen to be employees of operators signatory of the contract can qualify" (1085a). The statement, Mitch declared, "didn't go further, because they didn't ask me there" and continuing he declared, "If they are 'UMW members' and work in non-union mines they cannot qualify" (1085a).

Phillips persists (P. 39-43) in ignoring and distorting undisputed documentary evidence showing union membership is not a condition precedent to an award of benefits. Pension files show pensions were awarded applicants who had been but were not UMW members when applications were filed and pensions granted (Ex. 138-143; 1669-1712a).

Phillips' statement (P. 42) that Trustees ignored an application until the applicant hired a lawyer has no factual record predicate (see 1515-16a). Similarly, its statement (P. 40) a letter from a Congresswoman was required to obtain an applicant's pension is inaccurate: undisputed proof shows the applicant was twice told it was essential to furnish proof of his age (Ex. 142; 1702a, 1706a); it was supplied only in the Congresswoman's letter; and two days after receipt of necessary proof, the pension was awarded (1707a).

Phillips correctly asserts (P. 41) it sought in interrogatories information as to non-union employees receiving benefits and Trustees objected. Phillips *failed to disclose* that the Fund's reason was *"The Fund does not keep records of union membership of each bene-*

ficiary" (369a). It omitted too that Phillips made no effort before the trial court to achieve answers to its interrogatories.

Phillips' complaint (P. 37) that Trustees maintain their Resolutions in secrecy is opposed by Mitch's undisputed statement, "We tell any applicant that writes into the trust fund . . . what he must meet by way of eligibility" (1086a), which is corroborated by record documents (1684a, 1685a, 1694a, 1678a) and the fact that Fund Annual Reports disclose the eligibility requirements (1026-31a).

Phillips' contention (P. 35) that pensioners were required to retain UMW membership and pay dues after 1950 is countered by positive evidence that "it is definite that a pensioner does not need necessarily, to take his pension, to obtain membership in" UMW and "it is not true that only members of 'UMW' are eligible for awards" (379a).

Though, as Phillips asserts (P. 34), local and district officers processed welfare fund applications, and forms have space for certification of UMW membership (P. 37), this practice was unrelated to any alleged UMW plan to control the Fund. The service was voluntary (287a); 80 per cent of bituminous coal is produced by signatory operators (1162a); 99 per cent or more of applicants were UMW members (364a); thousands of applications have listed fraudulent averments by both individuals and coal companies attempting to "assist" unqualified individuals to obtain benefits; services rendered by local and district officers was "the only source that the information could be gotten respecting (UMW) members and was a "procedural technique designed to protect" the basic integrity of the Fund (361a). Abundant proof establishes it is

unnecessary that application forms be processed by union officials. Applicants have been advised that if they are not UMW members, inquiries should be directed to the Fund (1685a, 1694-95a, 1700a, 1708-09a, 1086a). Pertinently, when an applicant writes directly to the Fund, the portion of the application form requiring union certification is torn off (1087a)—a fact Phillips ignores in discussing the forms (P. 37).

3. The Sixth Circuit Appropriately Concurred in the District Court's Holding That the Evidence Was Insufficient to Show Trustees Held Out to Industry's Employees the Fund Was Under UMW Control

Like the district court, the Sixth Circuit rejected Phillips' contention that Trustees held out to industry employees the Fund was under UMW control.

As already shown (ante, p. 19), Trustees informed the industry's employees of their rights to Fund benefits in Annual Reports which were widely distributed to numerous individuals, including signatory operators, as well as all others requesting copies (1029-31a), and published in their entirety in the UMW Journal (1092a), and which detailed the Fund's activities, showing UMW membership is not the essential element for procuring Fund benefits.

Phillips' contrary assertions are not harmonious with its failure to object to the trial court's characterization of the trust instrument herein as being accordant with Taft-Hartley's requirements and particularly to that portion of the charge reading, "*The trust agreement provides* for the payment of *benefits to employees of signatory operators,* of which Phillips Brothers was one" (1572a). Phillips' contentions are discordant also with its agreement to the trial court's charge that Phillips "knew . . . *employees* were en-

titled" to Fund benefits and was under obligation so to inform them (1553a). Phillips conveniently overlooks this obligation when it complains (P. 39) its employees did not receive Fund benefit cards until they joined UMW.

The trial court's charge is significant too because Phillips points (P. 39) to testimony of an employee who vowed his "understanding" (979a) was that union membership was essential, although Phillips failed to disclose the witness' admission that while he was a UMW member, *benefits were withdrawn when he became employed by a non-signatory employer* (976a). Similarly, another employee "thought if I joined I would have my hospitalization . . ." (969a).

Since the 1950 Agreement (1115a) and Trustee resolutions (Ex. 144; 1074-76a) make *employment by a signatory operator*—not union membership—*the basic eligibility requirement,* it is legally irrelevant what Phillips' two employees understood or thought, for "An erroneous impression of plain terms does not change the meaning of the plain terms" and a contract's terms are not to be judged by "speculative, uninformed impressions of those terms." *Honolulu Star Bulletin, Ltd.* v. *NLRB,* D.C. Cir., 274 F. 2d 567, 570.

Phillips presented no evidence that Trustees held out to industry employees the Fund was under UMW control. Contrariwise, the proof sustains the conclusion that Trustees exercised every reasonable means to inform coal miners of their rights in the Fund.

The Sixth Circuit appropriately rejected, as the district court did, Phillips' contention.

4. The Sixth Circuit Correctly Approved the District Court's Conclusion That the Evidence Did Not Suffice to Show Trustees Required Pensioners to Picket for UMW to Obtain or Retain Fund Benefits

No person was required to picket for UMW to obtain or retain Fund benefits (1025a, 1059a, 1119a). Approval given by the Sixth Circuit to the district court's rejection of this element as proof of the alleged conspiracy, which Phillips again presses (P. 35, 43-47), is totally warranted.

Phillips notes (P. 44) each pension award carries a printed provision subjecting it to termination by Trustees at any time "for any matter, cause or thing" (1520a). Its argument (P. 44) the jury was entitled to conclude that such provision was calculated to, and did in fact, have a strong effect upon pensioners with respect to their obligation to UMW is answered by *Van Horn* v. *Lewis* (79 F. Supp. 544) which holds eligibility rules "can be changed from time to time as matters work out, and as the proper administration of the fund is ascertained".

Phillips points also to pensioners' activities in organizing drives "under the guidance of" UMW district presidents (P. 44); but nothing connects Trustees with such activities. Phillips concedes (P. 45) testimony establishing that pensioners activities were not discussed by Trustees (426a, 1059a, 1078a). In criticizing Trustees for failure to take some action with reference to pensioners, Phillips omits telling this Court that the trial court charged the jury that "Trustees . . . in their official capacity, had no legal right to require or not to require the beneficiaries . . . to picket on behalf of UMW in labor matters" (1572-73a), and Phillips made no objection.

Phillips' concern (P. 44-47) for pensioners obviously was not shared by pensioners themselves, since

no pensioner supports either Phillips' concern or avows the compulsion Phillips asserts. No testimony challenges Trustee Roche's statement she never had complaint from any pensioner who claimed his pension would be dropped if he refused to go on a picket line (1025a).

5. The Sixth Circuit Correctly Approved the District Court's Conclusion the Evidence Did Not Show Trustees Instituted Suits to Eliminate Small Operators

The sole proof offered by Phillips in support of its contention that Trustees used lawsuits to collect delinquent royalties to drive small operators out of business (P. 47) is the list of cases Trustees filed over an extended period of time (Ex. 39, 1607-18a; 428-30a). As the list shows, these suits were brought not only in Tennessee, but throughout the entire bituminous coal producing areas. The trial court observed the list, standing alone, could not be construed as a participating in a conspiracy by Trustees; Phillips agreed (430a).

Uncontradicted evidence shows Trustees placed upon their counsel Mitch sole responsibility of instituting suits to recover delinquent royalties (1019-21a, 1056-57a, 1071a); suits are instituted when recovery by other means fail (1071a); Trustees have never singled out small companies for litigation (1020a, 1057a) nor instructed Mitch to sue to put any operator out of business (1057-58a). Trustee appraisal that Mitch's recommendations of suits are "on the basis of complete impartiality" (1058a) stands unchallenged, as is Mitch's avowal in instituting suits no distinction is made between "large or small operators" or as to areas in which litigation is filed (1072a). No proof offered by Phillips disputes the foregoing evidence.

Every matter posed by Phillips (P. 47-48) reflects lawful conduct: Phillips' complaint of Trustees' insistence of collecting what Phillips terms "the last cent" and the policy of "no settlements" accord with the district court's jury instructions that "Trustees were legally obligated to collect all moneys due the Fund, and to use all reasonable means to make such collection, including . . . lawsuits" (1573a). What possible pertinency to the conspiracy issue is there of the number of Trustees' meetings per year and time spent discussing royalty litigation? And, regretful as it may be that employees may be affected as a result of litigation, the significant factor is that such a fact—if indeed it is one—is not proof of conspiratorial effort against small operators.

Jury justification for a conclusion Trustees enforcing royalty provisions were cooperating with UMW to drive small operators out of business is totally fanciful. "An unlawful purpose is not to be lightly inferred." *NLRB* v. *McGahey*, 5 Cir., 233 F. 2d 406, 413.

Phillips' derisive assertion (P. 31-2) that the operators' trustee position is insignificant is challenged by the undisputed evidence that there was "great difficulty finding anyone . . . satisfactory to the industry" in filling the vacancy created by Owen's death (1054a).

While Phillips continually assured the trial court the various overt acts alleged against Trustees would be "tied up" to the conspiracy, no such evidence was presented. The jury verdict was therefore contrary to the court's instructions that the acts charged against Trustees "standing alone, would not show the Trustees were co-conspirators" (1573a). The Sixth Circuit appropriately rejected the contention of Trustee participa-

tion in the alleged conspiracy in light of Trustees' strong and uncontradicted testimony (325 F. 818).

E. FACTS AND THE SIXTH CIRCUIT'S CONCLUSIONS PERTAINING TO ISSUES OF TRUSTEES' RIGHT TO HAVE THE TRUST PROVISIONS ENFORCED.

1. The Defense of Conspiracy

Phillips' assertion in Argument II (P. 49) that "There was proof to support every phase" of Phillips' conspiracy theories, *without detailing proof thereof,* is merely Phillips' technique of attempting to prove the "claimed existence" of the alleged conspiracy by "constant assertion" thereof "rather than in the proof." *G. & P. Amusement Co.* v. *Regent Theater Co.,* DC, N.D. Ohio, 1952, 107 F. Supp. 453, 461.

Phillips sets forth no facts but asserts both lower courts sustained the jury finding (P. 49), obviously referring to UMW since such statement is inaccurate as to Trustees. However, as demonstrated later herein (*post,* p. 32), the Sixth Circuit held the jury verdict "was not a bar to the right of the Trustees to collect the royalty payments which had accrued under the contract on the coal already mined" (325 F. 2d 818).

2. The Defense of UMW Coercion

Phillips' petition (pp. 50-53) sets forth its statement in support of its contention that the bargaining contract was forced upon Phillips and its employees. Without pointing out the inaccuracies therein, it is noteworthy that *nothing connects Trustees with the alleged events.*

The Sixth Circuit (325 F. 2d 819) approved the district court's award of royalty payments pursuant to the trust provisions from the time Phillips' employees joined UMW.

3. The Defense That the Agreements' Union Security Clause Rendered Them Illegal and Unenforceable and the Sixth Circuit's Rejection Thereof

Collective bargaining agreements in the bituminous coal industry antedating 1947 provided employees of signatory operators shall be or become UMW members. Taft-Hartley's enactment caused operators, in negotiations preceding the 1950 Agreement's execution, to insist the new contract provide for a union shop "to become effective when and to the extent permitted by law." Operators obtained (1476a) a federal court injunction prohibiting UMW from insisting that a successor agreement require UMW membership of employees "without compliance with Taft-Hartley's requirements". Operators and UMW, mandated to bargaining in good faith (1476-78a), agreed upon a union-security clause to comply with Taft-Hartley. Prior to the instant trial, the 1950 Agreement's union security clause had judicial approval of two federal Courts of Appeals (see, *post*, pp. 38-40).

The Sixth Circuit rejected Phillips' position (325 F. 2d 819).

SUMMARY OF ARGUMENT

I. The certiorari petition asserts no reason within this Court's Rule 19 for granting the writ.

II. The petition's Question (1) seeks review of the evidence and discussion of specific facts.

III. The Sixth Circuit correctly sustained the district court's rejection of the jury verdict that Trustees engaged in a *Sherman Act* conspiracy. Both lower courts correctly concluded there was no substantial evidence to sustain the alleged overt acts Phillips contended proved the conspiracy. Both correctly rejected

a verdict based on suspicion alone. The Sixth Circuit properly accepted the district court's setting the jury verdict aside "in the light of the strong and uncontradicted testimony of the Trustees themselves."

Phillips did not challenge the courts' conclusion that "Action of a majority of the Trustees is required to bind the Fund", and it concedes that *two of the three* Fund Trustees did not deal with coal operators conspiratorially.

To overcome the lack of supportive evidence, Phillips charges the district court *misconstrued* its theories; but Phillips agreed to the trial court's jury charges and expressly stated it had no additional ones to offer. It seeks to reinstate a jury verdict whose integrity and validity it itself challenges was based on a misconstruction.

IV. The Sixth Circuit correctly rejected Phillips' contention that the jury's finding of conspiracy rendered unenforceable Phillips' obligation to pay the royalties under the bargaining contract's trust provisions.

Royalties encompassed in the judgment against Phillips are payable to respondents as Trustees of the Fund, which cannot be subjected to legal liability for Trustees' alleged torts.

This Court's *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 466 (1960) teaches that Phillips' obligation arose "independent of the union's performance" and "upon the production of coal". Phillips' obligation to pay royalties was a condition of employment of employees and "another form of compensation" to them. Phillips should not be permitted to escape its obligation and thus enrich itself after employees have produced its coal. Phillips' illegality contention is challenged by *Kelly* v. *Kosuga*, 358 U.S. 516, 518, holding that "the plea of illegality based on a violation of Sher-

man Act has not met with much favor in this Court." This has particular application where, as here, employees produced the coal in exchange for wages, including the royalties, and Trustees are held not to have engaged in the alleged conspiracy. The relevancy of the Sixth Circuit's citations is not challenged.

V. The Sixth Circuit correctly rejected Phillips' contention that the alleged coercion exerted by UMW in Phillips' execution of the labor agreements and its employees' joining UMW rendered unenforceable Phillips' contractual obligation to pay royalties. It properly swept aside Phillips' argument (P. 63-68) *International Ladies Garment Workers' Union, AFL-CIO* v. *NLRB*, 366 U.S. 731, sustained its position. Whereas Phillips seeks, by evading payment of royalties, to impose a penalty upon Fund *beneficiaries who produced its coal, Garment Workers* made clear "no penalty is attached to the violation" (366 U.S. 740). Phillips would expand *Garment Workers:* instead of limiting its mandate to suspend future consequences of a labor agreement, Phillips would apply it so as totally to destroy rights accrued under the contract prior to any declaration of its status. The Sixth Circuit appropriately rejected Phillips' position, holding that "with respect to the coal already mined and the rights accrued thereby, Trustees' right to recover is not barred", citing *Benedict* (361 U.S. 459) and *Kelly* v. *Kosuga* (358 U.S. 516).

VI. The Sixth Circuit correctly rejected Phillips' contention that the Agreements' union security clause precluded Trustees' recovery of royalties on authority of *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71 and *Benedict* (361 U.S. 459, 468-70). Phillips' argument that the bargaining agreements were illegal because UMW did not comply with Taft-Hartley's non-communist affidavit provisions of Section 9(f), (g) and (h) is opposed by *UMWA* v. *Arkansas Oak*

Flooring Co., 351 U.S. 62, 73; *NLRB v. District 50, UMWA*, 355 U.S. 453, 462.

Phillips' contention that the union security clause renders the labor agreements illegal is challenged by decisions of the Sixth and Seventh Circuits, holding the precise clause to be legal. These decisions accord with holdings of this Court and the District of Columbia Circuit. Phillips distorts the meaning of district court cases cited by it.

Moreover, Trustees question Phillips' right to raise the issue presented in its Question (4) [P. 2] involving the union security clause, since Phillips claimed the "*conspiracy*" issue was the sole defense to Trustees' claim (35a, 45a).

ARGUMENT

I. PHILLIPS DOES NOT ASSERT ANY REASON STATED IN THIS COURT'S RULE 19 FOR GRANTING CERTIORARI.

At no place in Phillips' certiorari petition does it assert, as a reason for granting the writ herein, that the Sixth Circuit's decision as to Trustees conflicts with any decision either of this Court or any federal court of appeals, or that it presents an important question of federal law which this Court should settle, or any other reason delineated in the Court's Rule 19-1(b). Indeed, it does not even suggest, as the Rule requires, any "special and important reasons" for the writ's issuance.

II. PHILLIPS SEEKS THIS COURT'S REVIEW OF EVIDENCE WHICH TWO FEDERAL COURTS HAVE HELD DID NOT SUPPORT ITS CHARGE OF CONSPIRACY.

Since Phillips' petition poses, as its Question (1) [P. 2], "*Was there substantial evidence to support the jury verdict that the trustees participated in the con-*

spiracy alleged by Phillips", it invites implementation of the rule that the Court does not "grant a certiorari to review evidence and discuss specific facts". *U.S.* v. *Johnson*, 268 U.S. 220, 227.

III. THE SIXTH CIRCUIT WAS CLEARLY CORRECT IN SUSTAINING THE DISTRICT COURT ON THE CONSPIRACY ISSUE.

Under the factual recitals relating to the *overt acts* which Phillips contended proved Trustees' participation in the alleged conspiracy, Trustees have shown (*ante*, pp. 8-24) the two lower courts correctly appraised the evidence as lacking in support of the conspiracy charges. Phillips does not challenge the Sixth Circuit's finding that there is "no direct evidence" of Trustees' participation (325 F. 2d 818). Pertinently, Phillips *concedes* (P. 22) neither Roche, nor Schmidt nor Owen (while living) dealt with large coal operators conspiratorially. Significantly, it does not attack the lower courts' premise that "Action of a majority of the Trustees is required to bind the Fund" (325 F. 2d 818).

Though Phillips' Question (1) herein poses the inquiry if there was substantial evidence that "Trustees *participated* in the conspiracy" (P. 2), and the jury charge specified the *overt acts* which Phillips claimed constituted Trustees' activities in connection with the alleged conspiracy, Phillips' present quarrel is the trial court misconstrued its theories and that Trustee participation consisted of a majority of Trustees taking a do-nothing attitude with reference to those overt acts (discussed *ante*, pp. 8-24). Yet, in arguing the thesis of misconstruction (P. 56-58), Phillips does not point to evidence of Trustee participation but to alleged efforts of UMW to control the Fund *prior to 1950*, urging operators turned the control of the Fund over to UMW.

When it is considered that Phillips announced to the trial court it had *"no exceptions to the charge and no requests for additional charges"* (1585a), its present charge of misconstruction is not only baseless but is necessitated by its inability to specify any evidence showing Trustee participation in the alleged conspiracy.

Phillips' identical charge of misconstruction made in the Sixth Circuit obviously did not impress that court; and properly so, since not only did the charge come too late but, if the trial court misconstrued Phillips' position *it is indeed anomalous that Phillips seeks to have this Court reinstate a jury verdict whose integrity and validity Phillips itself challenges on the ground it was based on a misconstruction.*

Delaware Valley Marine Supply Co. v. *American Tobacco Co.*, 3 Cir., 297 F. 2d 199, 202, emphasized that "conspiracy remains an essential ingredient of a case based on Section 1" of *Sherman*. As in each of the lower courts, Trustees insisted, as they do now, that the record, vast as it is, is completely without evidentiary predicate for any finding of conspiracy against Trustees. The district court refused to sustain a verdict based upon suspicion (A. 5a), which accords with the holding in *Moore* v. *C & O Ry. Co.*, 340 U.S. 573, 578, that *"Speculation cannot supply the place of proof."* The Sixth Circuit correctly declared there was *no direct evidence* Trustees participated in the alleged conspiracy and appropriately rejected "inferences which Phillips would have us draw" because "not justifiable or reasonable *in the light of the strong and uncontradicted testimony of the Trustees themselves"* (325 F. 2d 818).

IV. PHILLIPS' CONTENTION THAT TRUSTEES MAY NOT RECOVER THE DELINQUENT ROYALTIES BECAUSE OF THE JURY'S FINDING CONCERNING THE ALLEGED CONSPIRACY HAS NO MERIT.

Phillips' argument (P. 59-60) that because the jury found UMW engaged in a conspiracy with major coal companies, the lower courts should not have enforced the trust provisions of the collective bargaining agreement which entitle Trustees to recover delinquent royalties. *One basic factor ignored by Phillips is that Trustees did not participate therein.* While Phillips presented the same argument in the Sixth Circuit, its opinion does not deal with the impact of UMW's participation. However, because the district court held the evidence insufficient to sustain the jury verdict as to Trustees, it held it unnecessary to determine the issue of whether Trustees would be deprived of recovery had there been supporting evidence that Trustees conspired as charged (A. 5a). The Sixth Circuit held (325 F. 2d 818) that, should the district court's ruling and its concurrence therein be incorrect, the jury verdict was not a bar to Trustees' right of recovery of royalty payment "which had accrued under the contract on coal already mined", citing *Kelly* v. *Kosuga*, 358 U.S. 516; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540, 549; and *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165. Pertinently, Phillips does not challenge the relevancy of the cited cases. Trustees submit the Sixth Circuit's conclusion is a correct one and the same result obtains even upon the assumption of this Court's agreement with the Sixth Circuit's ruling as to UMW on the conspiracy issue.

First, royalties which the judgment encompasses are payable to respondents as Trustees and not to them as individuals. This is a crucial recognition. *Yonce* v.

Miners Memorial Hospital Assn., DC, W.D. Va., 1958, 161 F. Supp. 178, 188, which involved an alleged violation of the Antitrust Act, held "trustees hold legal title to property for the benefit of others" and "a trust fund cannot be subjected to legal liability for the torts of the trustee". Pertinently, *Yonce* held the Trust Fund involved in this instant action "would not be liable for the tortious acts of the trustees in this case, wherein it is alleged they wilfully and purposely violated Secs. 1 and 2 of the Sherman Antitrust Act."

Lewis v. *Benedict Coal Corporation*, 361 U.S. 459, 466, professed that "royalty payments are really another form of compensation to the employees". Thus to permit Phillips herein to prevail in its contention that the alleged conspiracy defeats Trustees' right to recover Fund royalties would deprive employee beneficiaries of the right to compensation for labor admittedly performed and would do violence to lawful rights of innocent employes and, at the same time permit Phillips to escape its legal duty to pay the royalties which *Benedict* declared arose "upon the production of coal" (361 U.S. 466). Phillips would thereby become enriched at the expense of the Fund beneficiaries who have produced the coal when Benedict's teaching is that Phillips' obligation arose *"independent of the union's performance"* (361 U.S. 466).

NLRB v. *Rockaway News Supply Co.*, 345 U.S. 71, 77, rejects Phillips' contention in its statement:

> *"It is one thing for the Board to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract. . . ."*

The instant royalty claims became a condition of employment as to Phillips' employees in their individual employment contracts (*J. I. Case Co.* v. *NLRB*, 321 U.S. 332; *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 469), and were entered into by the employees with Phillips *in good faith*. To permit Phillips now to escape the payment of the royalties which flow to the employee-beneficiaries of the Fund (*Benedict*, 361 U.S. 468-9)[10] would permit Phillips to escape the obligation which he contracted, not alone with UMW, but with his employees who are guiltless of any wrong. These evident results from sustaining Phillips' argument stresses the pertinency of the quoted language from *Rockaway*.

Phillips concedes (P. 59) that not every contract made to carry out a conspiracy in restraint of trade is invalid; but Phillips argues that where the invalidity is inherent in the contract and the court would be enforcing the precise conduct made unlawful by such law, the anti-trust laws deny enforcement of the contract (P. 59).

Trustees submit that nothing contained in the trust instrument inherently tainted the contract; the trial court so told the jury (1572a) and *Phillips acquiesced* (1585a). Further, *the jury charge, with which Phillips was in whole agreement*, indicated no provision which rendered the collective agreement invalid. Thus, there is again presented in Phillips' arguments a position which does not coincide with the views of the Court's

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[10] In *Benedict*, the Supreme Court noted that "the obligation to pay royalty might be thought to be incorporated into the individual employment contracts" and that the similarities of royalty to wages "militates against the inference" that the trustees' claim be subject to offset (p. 469).

charge. Phillips' petition offers no case citation to support its position.

On the other hand, even if the Agreement were tainted, either by its language or by any conspiracy, *Kelly* v. *Kosuga*, 358 U.S. 516, rejects Phillips' contention. This Court (p. 519), assuming but not deciding "the petitioner's allegations duly charged a violation of" *Sherman*, declined to disregard claims brought under the terms of a contract though violative of *Sherman*. "*As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court*", stated the Court (358 U.S. 518), and, continuing, "*This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of the goods sold*" (p. 518). Concluding, the Court announced that "where, as here, a lawful sale for a fair consideration constitutes an intelligible economic transaction in itself", it is not "inappropriate or violative of the intent of the parties to give it effect even though it furnished the occasion for a restrictive agreement of the sort here in question" (p. 521). *Kelly*, significantly, was a case wherein the parties litigant were parties to the contract asserted to violate *Sherman*. Certainly, in the instant situation where Trustees are not involved in the making of the contract or in the conspiracy, Phillips' illegality plea is less appealing than that in *Kelly*.

Benedict's holdings that "royalty payments are really another form of compensation to the employees, and as such the obligation to pay royalty might be thought . . . incorporated into the individual contracts" and employees (as said in *Kelly*) have given a "fair consideration" in services in exchange for the royalty

payments, plus the holdings of *Rockaway* and *Case*, show the propriety of the Sixth Circuit's approval of the judgment in Trustees' favor against Phillips.

V. THE SIXTH CIRCUIT CORRECTLY REJECTED PHILLIPS' CONTENTION THAT THE MANNER IN WHICH PHILLIPS EXECUTED THE AGREEMENTS AND ITS EMPLOYEES BECAME UNION MEMBERS RENDERED THE AGREEMENTS INVALID.

The district court held Trustees were entitled to recover unpaid royalties when Phillips was signatory to the National Agreement and during which UMW represented a majority of Phillips' employees, namely, from April 25, 1955 to December 31, 1958 (A. 5a).

As in the Sixth Circuit, Phillips asserts (P. 60-68) UMW never represented an uncoerced majority of its empolyees and *Garment Workers*, under such circumstances, precludes enforcement of the bargaining agreement to any extent. In disagreement, the Sixth Circuit opined *Garment Workers* to be inapplicable (325 F. 2d 819) and that "In any event, *with respect to the coal already mined and the rights accrued thereby*, . . . the Trustees' right to recover is not barred", citing *Benedict* (361 U.S. 459) and *Kelly* v. *Kosuga* (358 U.S. 516).

Garment Workers, the Sixth Circuit pointed out (325 F. 2d 819), charged an employer with an unfair labor practice, condemned a labor contract because the union did not represent a majority of the employees, and ordered the employer not to give effect thereto, at the same time directing a representation election.

Notably, the Board Order enforced in *Garment Workers* (366 U.S. 731) did not void the collective agreement; instead, it assiduously recited that *nothing* therein should "*prejudice the assertion by employees*

of any rights they may have" under the condemned contract. *Bernhard-Altmann Texas Corp. et al and Int. Ladies' Garment Workers' Union,* AFL-CIO, 122 NLRB 1289, 1295. The Board Order was positive that wages and working conditions under the condemned contract were to continue, and *Garment Workers* (366 U.S. 739) noted the Order "merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative." It made clear *"no penalty is attached to the violation"* (366 U.S. 740). Yet, the result Phillips seeks herein would not only penalize by denying Trustees the right of recovery but its ultimate effect would be imposed upon employees whose rights *Garment Workers* carefully enunciated were not to be prejudiced.

This significant factor Phillips overlooks in pressing upon this Court that if a "contract is invalid and not to be enforced in a Board case" for lack of majority representation "or because of coerced representative status" as in *Garment Workers,* the same result obtains herein (P. 68).

But, Phillips' argument expands *Garment Workers'* mandate and instead of limiting it to suspend or abate future consequences of a labor agreement, as *Garment Workers* does, Phillips seeks to apply it so as totally to destroy rights which accrued under the contract prior to any declaration of its status.

Phillips' contentions are challenged by *NLRB* v. *Rockaway News Supply Co.,* 345 U.S. 71, 77, where, in considering the enforceability of a labor agreement's union shop clause claimed inconsistent with Taft-Hartley's requirements, this Court observed:

> ". . . even if inclusion of a forbidden provision is enough to justify the Board in setting [the

> collective bargaining agreement] aside *as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside.*"

Moreover, *Garment Workers'* recognition that employers' rights are not to be prejudiced has special applicability herein where Trustees seek recovery of unpaid royalties *on coal already mined. Benedict's* holding that a signatory's "duty to pay royalty" arose "on the production of coal" is consonant with the Sixth Circuit's requirement that Phillips pay on coal already mined by his employees. Further, a ready answer to Phillips' argument that UMW's majority resulted from union activity coercing employees in selecting UMW, is found in *Benedict's* enunciation that the duty to pay Trustees the royalty is "independent of the union's performance" (361 U.S. 466). Phillips overlooks that, just as the Agreement it signed vested Trustees with the right to have the stipulated royalty, the same Agreement burdened Trustees with an obligation to provide Phillips' employees with Fund benefits—an obligation characterized *as a valuable right accorded those employees. Lewis* v. *Mearns*, DC, N.D. W. Va., 1958, 168 F. Supp. 134, 138, aff'd. 4 Cir., 268 F. 2d 427.

Notably, Phillips does not challenge the Sixth Circuit's reliance upon *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), discussed *ante*, p. 35. The Sixth Circuit was clearly correct in rejecting Phillips' position,

VI. THE SIXTH CIRCUIT CORRECTLY REJECTED PHILLIPS' CONTENTION THE UNION SECURITY CLAUSE IN THE AGREEMENT PRECLUDED TRUSTEES' RECOVERY OF DELINQUENT ROYALTIES.

Phillips' urges (P. 68-72), as in the Sixth Circuit, that Trustees are precluded from recovering unpaid royalties because UMW had not complied with the

non-communist affidavit provisions of Taft Hartley's Section 9(f), (g) and (h) [29 USCA 159(f), (g) and (h)], thus rendering the contract and its union security clause illegal. The Sixth Circuit (325 F. 2d 819) rejected Phillips' position on authority of *NLRB* v. *Rockaway News Supply Co.*, 345 U.S. 71, which avows (p. 77),

> "It is one thing . . . to say that the parties should not go on under such a contract; it is another to say that no effect whatever may be given to a contract . . ."

and *Lewis* v. *Benedict Coal Corporation*, 361 U.S. 459, 468-470, where this Court, after noting that Phillips' *legal duty to pay royalties arose "upon the production of coal . . . independent of the union's performance"* (p. 466) held *inter alia* (p. 469) "royalty payments are really another form of compensation to the employees."

Phillips wittingly persists in misconceiving the legal import of Taft-Hartley's non-communist affidavit requirements. In seeking to have the bargaining contract rendered illegal because, as Phillips argues, "UMW was disdainful" of such statutory provisions, it ignores this Court's holding that the statute "merely describes advantages that may be gained by compliance with their conditions." *UMWA* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 73; *NLRB* v. *District 50, UMWA*, 355 U.S. 453, 462.

The charge of illegality which Phillips would impress upon the bargaining contract herein because of its union security clause is fully dissipated by *Lewis* v. *Fentress Coal and Coke Co., Inc.*, DC, M.D. Tenn., 1958, 160 F. Supp. 221, aff'd. 6 Cir., 264 F. 2d 134; *Lewis* v. *Quality Coal Corp.*, 7 Cir., 270 F. 2d 140 (1959), cert. den. 361 U.S. 929, and *UMWA* v. *NLRB*,

7 Cir., 284 F. 2d 910 (1961), in which the clause challenged by Phillips was declared lawful. These cases, refuting Phillips' position, accord with *NLRB* v. *News Syndicate Co.*, 365 U.S. 695 (1961); *Int. Typo. Union, AFL-CIO*, 365 U.S. 705 (1961), and *Honolulu Star-Bulletin, Ltd.* v. *NLRB*, D.C. Cir., 274 F. 2d 567 (1959).

Phillips distorts the meaning of the district court's *Lewis* v. *Fentress* (160 F. Supp. 221), *Lewis* v. *Hixon*, DC, W. D. Ark., 1959, 174 F. Supp. 241, and *Lewis* v. *Kerns*, DC, S. D. Ind., 1959, 175 F. Supp. 115. Contrary to Phillips, they do not stand for the proposition that "this Union Security Clause was in effect and was intended to be enforced except in 'right to work' states'" (P. 71). Though stating the clause was not intended to be in effect in right-to-work states, which was the issue in both *Hixon* and *Kerns*, nothing in either case indicates, as Phillips interprets them, the clause was intended to be effective elsewhere. Both *Fentress* (160 F. Supp. 221) and the Seventh Circuit's *Quality* and *UMWA* v. *NLRB* cases are to the contrary.

In any event, Trustees question Phillips' right to raise Question IV since Phillips, in a successful pretrial motion to consolidate for trial Trustees' claim with Phillips' claim against UMW, to which both Trustees and UMW objected, Phillips declared the conspiracy was *"the only defense to"* Trustees' claim (45a). Further, Phillips agreed to the dismissal of its claim against UMW based upon 29 USCA, Section 158(b), the district court noting Phillips "concedes" the ground "well-taken" (35a).

CONCLUSION

For the foregoing reasons it is submitted that the petition for a writ of certiorari should be denied.

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